Supreme Court, U. S.
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80-974

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. _____

CYNTHIA FORD,
Petitioner

v.

DOROTHY FORD AND L. B. FORD,
Respondents

PETITION FOR WRIT OF CERTIORARI TO COURT OF CIVIL APPEALS NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AT BEAUMONT

ROBERT B. O'KEEFE
P. O. Box 1069
Nacogdoches, Texas 75961
(713) 560-1455

Counsel for Petitioner

Of Counsel:

EAST TEXAS LEGAL SERVICES
P. O. Box 1069
Nacogdoches, Texas 75961

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cynthia Ford, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas, at Beaumont, which was entered in this cause on the seventh day of February, 1980.

QUESTIONS PRESENTED

1. WHETHER THE DUE PROCESS CLAUSE PROTECTS AGAINST PERMANENT SEVERANCE OF PARENTAL RIGHTS EXCEPT UPON EVIDENCE WHICH IS SUFFICIENT TO FAIRLY SUPPORT A CONCLUSION THAT EVERY ELEMENT OF THE STATUTORY BASIS ALLEGED HAS BEEN ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE?

2. WHETHER THE LOWER COURTS TERMINATION OF PETITIONER'S PARENTAL RIGHTS, BASED ON THE EVIDENCE PRODUCED, VIOLATED HER RIGHT TO SUBSTANTIVE DUE PROCESS?

OPINIONS BELOW

The opinion of the Court of Civil Appeals is unreported and is printed in Appendix A, hereto, infra, page A-1. The judgment of the Court of Civil Appeals is printed in Appendix C hereto, infra, page C-1. The findings of fact and conclusions of law and the judgment of the District Court are printed in Appendix B hereto, infra, page B-4. The order of this Texas Supreme Court refusing, no reversible error, petitioner's application for writ of error, is printed in Appendix B, infra, page B-7. The order of the Texas Supreme Court denying petitioner's motion for rehearing is printed in Appendix B, infra, page B-7.

JURISDICTION

The judgment of the Court of Civil Appeals (Appendix A, infra, page A-1) was entered on the seventh day of

February, 1980. A timely motion for rehearing was denied by the Court on February 28, 1980 (Appendix C, infra, page C-3). Thereafter, petitioner filed an application for writ of error with the Texas Supreme Court which was refused, no reversible error on July 30, 1980 (Appendix B, infra, page B-7). A timely motion for rehearing was overruled by the Supreme Court on September 12, 1980 (Appendix B, infra, page B-7). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the construction and application of Article 15.02 of the Texas Family Code, which provides as follows:

§ 15.02 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and re-

mained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to remain; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of reliquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

This case also involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Texas statutory scheme for the involuntary termination of parental rights is Article 15.02 of the Texas Family Code. As written, the statute is broken into two general areas of inquiry; the first section[1] focuses on the conduct of the accused parent and the second[2] on the best interest of the child in question. The statute requires that the party seeking termination establish at least one of the basis set forth in § 15.02(1), as well as that contained in § 15.02(2).

On December 1, 1978, respondents, the parental grandparents of the child brought this action against petitioner[3] in the 159th Judicial District Court of Angelina County, Texas seeking to terminate her rights to have a parent-child relationship with her only child,[4] Holly Elizabeth Ford. Through their petition respondents charged that petitioner had failed to support her daughter in accordance with her ability for a period of twelve months ending within six months of the filing of the petition. As such, respondents alleged that petitioner had violated § 15.02(1)(F) of the Texas Family Code. Respondents also advised that termination of petitioners parental rights

1. § 15.02(1).

2. § 15.02(2).

3. Respondents also brought this action against Kenneth Ford, their son and the natural father of the child who at that time, was married to the petitioner. However, Mr. Ford voluntarily reliquished his parental rights under a Texas procedure providing for the same. See, Article 15.03, Texas Family Code. At the time of his relinquishment, Mr. Ford was estranged from petitioner.

4. And, as the evidence revealed, Holly Elizabeth is the only natural child Cynthia will ever have (S.F. 344—"S.F." or Statement of Facts, refers to the transcript of the oral testimony at trial).

would serve the best interest of Holly Elizabeth (Tr. 2-4).[5]

During the trial, the district court allowed respondents to add two more counts to their charge against petitioner. Specifically, respondents claim was broadened to include allegations under § 15.02 (1) (D) & (E) of the Texas Family Code, accusing petitioner, by her conduct, of endangering the physical or emotional well being of her child (Tr. 9).

The trial was to the court who, after taking the matter under advisement, rendered judgment that the petitioner's rights should be severed for all of statutory reasons which had been alleged by respondents (App. B, pp. B-1-B-4).

At the trial on the merits respondents called eleven witnesses, including themselves, to support their position. The social worker also testified at the request of the attorney ad litem. Conspicuous by their absence, were any medical or psychological experts, to enlighten the court on the issue of endangerment.

Generally speaking the evidence concerned itself with the conditions of homes which petitioner lived in, the manner in which she disciplined her child, the financial difficulties which she and her husband had encountered, her receipt of government assistance as well as the aid which she received from local churches and family members, including respondents, and her personal life.[6] In

5. "Tr." refers to the record made in the courts below.

6. For the convenience of the Court, petitioner has prepared a detailed summary of the evidence, which is printed in Appendix D). Accordingly, they will not be belabored here. This summary is excerpted from her application for writ of error filed with the Texas Supreme Court.

particular, respondents focused a great deal of their effort in trying to establish the following: that petitioner kept dogs in her home which generated a "foul odor" (S.F. 18); that *once* there were animal droppings in the home (S.F. 81); that petitioner had caught a rat in one of her homes (S.F. 24, 161-162); that petitioner used cuss words in front of her daughter (S.F. 19); that petitioner had slapped her daughter on *four* occasions in five years (S.F. 18-19); that petitioner had "supported" her child by borrowing from friends, relatives, *including respondents,* the church and had received food stamps and "welfare" (S.F. 157, 158); that petitioner's mother had committed her to the state mental institution, on one occasion ,after taking an overdose of sleeping pills (S.F. 199, 252); that petitioner had been convicted for perjury and she was on probation (S.F. 201-202); and that, on one occasion, petitioner and her daughter stayed in a motel with a man (S.F. 212).[7]

After hearing the evidence the trial court took the case under advisement and granted petitioner leave to file a brief. Petitioner did so and argued[8] to the court that the parent-child relationship is protected by the Constitution and that respondent had failed to produce any evidence which showed emotional endangerment of the child, physical abuse, or that she failed to support her child in accordance with the statute. Accordingly, petitioner argued, respondents had failed to establish the required elements by clear and convincing evidence. Being of the

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7. Of course, petitioner's evidence factually refuted many of these charges, and for others, cross examination and petitioner's witnesses put them in the proper light. (Please see, infra, summary of evidence, Appendix D).

8. See, Respondent's Post Trial Brief, pp. 2-7 (Tr. 19).

contrary view, the district court entered judgment for respondents.

Thereafter, petitioner appealed to the Court of Civil Appeals for Ninth Supreme Judicial District. Through her brief, petitioner challenged the sufficiency of the evidence both from a no evidence and an insufficient evidence view as it related to all of the statutory grounds set forth for termination.[9] Additionally, petitioner set forth her position regarding her constitutional protections and the mandates arising thereunder.[10] In its memorandum opinion affirming the decision of the district court, the Court of Civil Appeals recognized that the parent-child relationship is one of "constitutional dimensions", however, was of the view that the evidence "supports the trial court's decision" and overruled petitioner's no evidence and sufficiency of evidence points.[11]

A timely motion for rehearing was filed with the Court of Civil Appeals. In her motion petitioner argued that to find the evidence in this cause sufficient to terminate her parental rights under the statutory provisions alleged, operated to deprive her of her right to substantive due process under the Fourteenth Amendment of the Constitution of the United States.[12] The motion for rehearing was denied without opinion.

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9. See, Brief for Appellant, pp. 4-7 (Tr. _____), Appendix E, pp. E-1-E-4.

10. See, Brief for Appellant, pp. 13-14 (Tr. _____), Appendix E, pp. E-4-E-6.

11. At this point, it is important to note that where *fundamental* constitutional rights are at stake, and one challenges the sufficiency of the evidence to support the deprivation thereof, a federal constitutional question is raised. See, e.g. *Jackson v. Virginia*, 433 U.S. 307, 322 (1979).

12. See, Appellant's Motion for Rehearing, pp. 3, 5, 6 (Tr. _____), Appendix F, pp. F-1-F-4.

Petitioner next sought discretionary review from the Texas Supreme Court by way of application for writ of error. In her application petitioner argued that there was no evidence to support the lower court's determination that petitioner's parental rights should be terminated.[13] Additionally, petitioner argued, *inter alia*, that her right to have a relationship with her child was constitutionally protected and to terminate her rights based on the evidence produced, would deprive her of substantive due process of law.[14] The application was refused, no reversible error. A timely motion for rehearing was filed by petitioner, in which she argued that to permanently sever her parental rights based on the evidence produced was a deprivation of those rights secured to her under the Fourteenth Amendment.[15] The motion was overruled by the Supreme Court on September 12, 1980. In her motion for rehearing petitioner did not challenge the lower court's findings under § 15.02(2) of the Texas Family Code nor does she seek to challenge that finding in this Court.

Petitioner seeks this review in this Court of the decision of the courts below,[16] because of her love for her

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13. In Texas, the Supreme Court does not have jurisdiction to consider "insufficient evidence" points inasmuch as they are considered to be factual sufficiency points. See, Article V. Section of the Constitution of the State of Texas.

14. See, Application for Writ of Error, pp. 9-14 (Tr. _____), Appendix G, pp. G-1-G-2.

15. See, Petitioner's Motion for Rehearing, pp. 3-7 (Tr. _____), Appendix H, pp. H-1-H-5.

16. Petitioner has requested that this Writ of Certiorari be issued to the Court of Civil Appeals, which, in Texas, is an intermediate appellate court. Petitioner has done so based on her understanding of the prior decisions of this Court in *Adam v. Saenger*, 303 U.S. 59

child and her abiding belief that she has been forever deprived[17] of her parental rights without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Texas Courts To Terminate Petitioner's Parental Rights Is In Conflict With The Principles Set Forth By This Court In Jackson v. Virginia.

Like the Appellants in *Doe v. Delaware,* probable jurisdiction noted, ____U.S.____, 100 S.Ct. 1336 (1980), petitioner brings before this Court substantial questions under the due process clause, regarding the proffered justifications for the deprivation of her parental rights.

It is now well established that the parent-child relationship is one which is shrouded with the protection of the Fourteenth Amendment to the Constitution of the United States. See, e.g., *Wisconsin v. Yoder,* 406 U.S. 205, 231-233 (1972). The ties within a natural family unit are, without a doubt, the most essential of those areas of family integrity accorded protection, not only because its origins are apart from the power of the state and it is

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(1938) and *Myers v. International Trust Co.,* 273 U.S. 380 (1927). If petitioner has misconstrued these decisions, then she would request that this petition be treated as one for a writ of certiorari to the Texas Supreme Court.

17. The effect of a termination of parental rights in Texas, is to forever divest one of all parental rights and privileges. See, Article 15.07 of the Texas Family Code.

so firmly steeped in this nation's history and tradition, but because it is through the family unit that we "inculcate and pass down many of our most cherished values, moral and cultural". *Moore v. East Cleveland,* 431 U.S. 494, 503-504 (1977). Indeed, over thirty years ago this Court recognized the integrity of the family unit was fundamental, "it is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . ." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Thus, this Court has been zealous in efforts to protect the rights of parents and children from having their relationship and family life needlessly invaded. See, e.g. *Wisconsin v. Yoder,* supra, *Moore v. East Cleveland,* supra, *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974), *Meyer v. Nebraska,* 262 U.S. 390 (1923) and *Griswold v. Connecticut,* 381 U.S. 479 (1965). In so doing, this Court found the constitutional protection afforded is both procedural and substantive, *Smith v. Organization of Foster Families,* 431 U.S. 816, 842 (1977); and has recognized that there would be "little doubt" that the due process clause would be offended if a natural parent was divested of their parental rights, without a sufficient showing of the necessity to do so. *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978).

Substantive due process is, of course, a flexible concept following a "rational continuum which, broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the . . . needs asserted to justify their

abridgement". *Poe v. Ullman,* 367 U.S. 497 (1961) (Harlan, J., dissenting). Its limitations are not clearly drawn but instead are dictated by a careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society". *Griswold v. Connecticut,* supra, 381 U.S. at 501 (Harlan, J., concurring).

Any analysis under substantive due process requires an assessment of the interest to be protected and the reasons asserted to justify the deprivation. See, e.g. *Moore v. East Cleveland,* supra. It cannot be denied that where such a basic human right is concerned, petitioner's liberty and privacy interest are fundamental. *Smith v. Organization of Foster Families,* supra, 431 U.S. at 845; *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Likewise, there is a strong societal interest in protecting a child from harmful or neglecting parents. However strong this societal concern may be, it is not absolute, and it is to be balanced against petitioner's right to raise her daughter in an environment free from governmental interference. *Alsager v. District Court,* 406 F.Supp. 10, 22 (S.D., Iowa, 1975) aff'd 545 F.2d 1137 (8th Cir., 1975). Moreover, where fundamental interests are at stake[18] this Court requires that there be a "critical examination" of the underlying reasons advanced to support the deprivation, *Zablocki v. Redhail,* 434 U.S. 374, 383 (1978), and that the reasons advanced must be supported by record evidence, which is sufficient to support the conclusion reached. *Jackson v. Virginia,* 443

18. In *Davis v. Page,* 618 F.2d 374, 379 (5th Cir., 1980) the court characterized a parents interest in custody to their child as one of the most "basic and fundamental" liberties protected by the Constitution, the loss of which can be "equated with . . . imprisonment through criminal proceedings". Id. at 379.

U.S. 307, 317-318 (1979). Moreover, in Texas, this evidence must be of such a quality that the "trier of fact is left with a firm belief or conviction as to the truth of the allegations sought to be established". *In the Interest G.M.*, 596 S.W.2d 846-847 (1980).[19] Such an evidentiary burden, where fundamental rights are involved, petitioner submits, is constitutionally mandated.[20] See, e.g. *Addington v. Texas,* 441 U.S. 418 (1979). A constitutional corollary to this substantive standard is that the "fact-finder will rationally apply that standard to the facts of the case". *Jackson v. Virginia,* supra, 443 U.S. at 317. The failure to do so, where fundamental liberty interests are threatened, offends due process of law and the deprivation cannot stand. Id. at 318; *Quilloin v. Walcott,* supra, 434 U.S. at 255.

A critical examination of the record in this case reveals that all of the respondents' evidence concerned itself with the alleged acts or conduct of the petitioner, *without a shred of evidence* regarding how this conduct endangered, harmed or otherwise affected the child. Moreover,

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19. Prior to this decision by the Texas Supreme Court, the burden of proof in involuntary termination proceedings, in Texas, was preponderance of the evidence. See, Article 11.15 of the Texas Family Code. The decision of the Texas Supreme Court in *In the Interest of G.M.*, supra, was rendered subsequent to the proceedings in the court of civil appeals but prior to the filing of petitioner's application for writ of error to the Texas Supreme Court.

20. The decision of the Texas Supreme Court in *G.M.*, supra, to establish a "clear and convincing" evidentiary standard, was bottomed on this Court's decision in *Addington v. Texas,* supra. However, petitioner recognizes that this is one of the questions presented by the Appellants in *Doe v. Delaware,* supra, a case in which this Court has noted probable jurisdiction. The Texas Supreme Court read the due process clause and this Court's decision in *Addington,* supra, as requiring the same. The rationale of this Court in *Addington,* supra, applies, petitioner believes, *a fortiorari,* where parental rights are at stake.

the evidence that petitioner had failed to support her child, as required by the statute, could not even be fairly characterized as a "mere scintilla".[21] It was, quite simply, non existent.

It is axiomatic, that the process that is due an individual is to be measured, in part, by the extent to which the person "may be condemned to suffer a grievous loss" *Goldberg v. Kelly*, 397 U.S. 254 (1970). It seems a literal certitude that the loss of a child carries with it a "stigma which may be as traumatizing to the parent as imprisonment".[22] *Davis v. Page*, 618 F.2d 374, 379 (5th Cir., 1980). It is for this reason, that our Constitution will not tolerate a deprivation, which is not only not justified by compelling reasons but was founded on evidence, the quality of which will not permit *any rational* trier of fact to conclude that essential elements of respondents' charges[23] had been established by clear and

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21. Much of respondents evidence focused on the financial difficulties of petitioner, and her need for governmental assistance and help from her friends. (See, summary of evidence, App. D). It is undeniable that petitioner lived in abject poverty. Considering this, one would think that her tireless efforts to see that her daughter had adequate support is the act of a responsible parent of heroic proportions not that of an unfit mother. What was being questioned by respondents was the manner in which petitioner provided the support, which, of course, raises serious constitutional questions regarding freedom of choice in matters of family life. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

22. There is a difference, of course. One who is "locked in" has a hope, an expectation, that they will be returned to a societally normal existence. For a deprived parent, life will never become normalized as they will remain "locked out", with no hope for parole.

23. Under § 15.02 (1) (D), (E) & (F). Specifically, respondents' failure to establish endangerment or harm from anything petitioner did or did not do and respondents' total failure to establish their support allegation under § 15.02 (1) (F). Although this finding was apparently unimportant to the court of civil appeals. See, App. A, p. A-5.

convincing evidence. This violates the principles set forth by this Court in *Jackson v. Virginia,* supra, and renders the permanent loss of petitioner's only child constitutionally intolerable.

II.

In Terminating Petitioner's Parental Rights The Court Of Civil Appeals Did Not Follow This Court's Decision In Addington v. Texas.

In *Addington v. Texas, supra,* 441 U.S. 418, this Court determined that the outcome of a civil commitment proceeding is of "such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Id. at 422. Moreover, this Court was concerned with the significance" of the impact that such a deprivation can have on the individual, and accordingly found that the "risk of error" is not to be "shared equally". Id. From this analysis this Court recognized that proof by a mere preponderance, was constitutionally unacceptable and held that in a civil commitment proceeding the evidence must be established by an evidentiary standard which requires a higher degree of certainty.

The standard of proof required by this Court's *Addington,* is constitutionally mandated for termination of the parent-child relationship. See, e.g. *Alsager v. District Court,* supra, aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976); *In the Interest of G.M.,* supra.

At the time this case was reviewed by the court of civil appeals,[24] the decision of the Texas Supreme Court

24. See, note 19, supra.

had not come down in *G.M.*, supra, and § 11.15 of the Texas Family Code still mandated the use of a preponderance standard. The application by the court of civil appeals of a preponderance standard to evidence presented in this case, where a fundamental liberty interest is at issue, operated to deprive petitioner of procedural due process of law;[25] *Addington v. Texas,* supra; W*oodby v. INS,* 364 U.S. 350 (1960), and it cannot be allowed to stand.

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25. In its memorandum opinion the Court of Civil Appeals did not delineate its standard for review. Although, it is clear that the Texas courts, including this Court of Civil Appeals, viewed preponderance of the evidence as the proper evidentiary standard. See, e.g. *Johnson v. Jefferson County,* 557 S.W.2d 569, 571 (Civ. App. Bmt., 1977) and *In the Interests of C__ D__ V__,* 589 S.W.2d 543, 546-547 (Civ. App. Amarillo, 1979). However, if this Court were to deem the record too unclear or the state of law in Texas, at that time, too vague to permit proper resolution of this issue, it could exercise its discretionary power to remand the case. See, e.g. *Time, Inc. v. Firestone,* 424 U.S. 448 (1976).

CONCLUSION

For the reasons set forth in this Application, petitioner prays this petition be granted and a writ of certiorari issue to review the decision and judgment of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas, at Beaumont.

Respectfully submitted,

ROBERT B. O'KEEFE
P. O. Box 1069
Nacogdoches, Texas 75961
(713) 560-1455

Counsel for Petitioner

Of Counsel:

EAST TEXAS LEGAL SERVICES
P. O. Box 1069
Nacogdoches, Texas 75961

APPENDIX A

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas

J. A. HULGAN, Clerk

(Filed February 7, 1980)

NO. 8404

CYNTHIA FORD, Appellant

v.

DOROTHY FORD, ET AL, Appellees

This is an appeal by Cynthia Ford from a judgment terminating the parent-child relationship between appellant and her daughter, Holly Elizabeth Ford, and appointing the State Department of Human Resources as the Managing Conservator of the child.

All of appellant's points of error question the sufficiency of the trial court's judgment as authorized in the Texas Family Code, TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980), and they will all be addressed together in this opinion. The father of the child, James Kenneth Ford, signed an affidavit relinquishing parental rights.

Dorothy Mae Ford, a grandparent, received a call from appellant to the effect she was in trouble with the law and asked the grandparent to get the child. The baby was dirty and bruised. The five-year-old child was undernourished and had few clothes. Two weeks prior, the

grandparent had gotten the child because her parents had no food. The grandparent and Welfare had paid for medicine for the child several times. The grandparent had seen the appellant strike the child. Both parents used foul language in the child's presence. At the time of this hearing the child's father was serving a term in the penitentiary.

L. B. Ford, Jr., the child's grandparent, said the child's behavior had improved since being with them. He has seen the parents of the child abuse her. The child's parents moved a lot.

The child's father came from Huntsville to testify and believes the child is doing fine now in her grandparents' home. The father had several criminal convictions but was in prison for arson. The mother was never employed. He has caught appellant staying with other men. Appellant has been hospitalized for drug abuse. The mother of appellant committed her to Rusk (the State hospital).

Arlis Havard, appellant's father, testified the child "went lacking with them [parents]." Appellant called him often for money saying she was out of food. Once when the witness visited appellant, the house was filthy; there were four to seven dogs, and animal "droppings" were in the house.

Mrs. Doris Burns once lived next door to appellant and her husband. She has seen men other than appellant's husband "kinda staying at that house." After they (appellant and her husband) moved, Mrs. Burns looked inside the house and it was "filthy."

Iva Burke, grandmother of Kenneth Ford, said appellant and her husband once lived next to her. She saw

them storming and cursing at Holly. She saw Holly go hungry. Often she saw men coming in the house. Appellant's house "smelled just like a hog pen, so many dogs in the house." She saw them mistreat the child. She let them live in her store building once but ran them off because of the "trash" they went with, and the dogs.

M. L. Warner, Constable for Precinct 5 (Diboll), had filed charges on appellant and her husband. He has seen Holly since she moved with the Fords, and she is "cleaner, better mannered."

Joyce Williams had appellant and Holly live with her for a time, and appellant's conduct toward the child "wasn't good."

Grace Hambrick has observed the child in appellant's home and her present home, and she is now much better off.

Appellant, Cynthia Ford, married at eighteen; she said Holly always had an adequate place to live. When Kenneth was out of work, she got help from her parents and her in-laws. She never had dogs in the house after Holly was born. Her father, Havard, has never been inside one of her abodes since Holly's birth. Holly has always had sufficient food. She always had sufficient clothing. When Kenneth was in jail, she asked Kenneth's parents to keep Holly a few days. They agreed but refused to return her. In order to get money to get Holly back, she sold her car and her furniture. She is presently living with Michael Flanagan. She has filed for divorce from Ford and plans to marry Flanagan. Her mother committed her to Rusk for drug abuse. She had written some hot checks. She is currently on proba-

tion for perjury. She admitted to sleeping with another man in a Lufkin motel, with the child in bed next to the lovers.

Michael Flanagan, five years younger than appellant, testified he was willing to support Holly and intended to marry appellant.

Mrs. Martha Massey, appellant's mother, said Holly was always well fed and treated well by appellant, and that, in her opinion, there were strong emotional ties between appellant and Holly. Mrs. Massey committed appellant to Rusk for the drug problem. She had never seen appellant abuse Holly.

Janet Whitten, an employee of the Department of Human Resources, after investigation, recommends that the parental rights of both appellant and her husband be terminated. The child has shown improvement since living with her grandparents.

Mrs. Louise Cain had been in the various residences of appellant and found them clean and adequate. Holly was always well nourished and clothed. Appellant and Holly are very close.

Mary Dell Williams, appellant's sister, had never seen appellant abuse Holly. She (appellant) took good care of the child.

In Texas, the parent-child relationship is of constitutional dimensions. *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976); *Wiley v. Spratlan,* 543 S.W.2d 349 (Tex. 1976); *Herrera v. Herrera,* 409 S.W.2d 395 (Tex. 1966). And the termination of a parent-child relationship may not be based solely upon what a trial court determines to be the best interest of a child, *Holley v. Adams,* supra at 370.

However, a strong even primary consideration in such a proceeding is the best interest and welfare of the child. *Hall v. Harris County Child Welfare Unit,* 533 S.W.2d 121 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ); *Matter of Gilmore,* 559 S.W.2d 879, 882 (Tex. Civ. App.—Tyler 1977, no writ). See the factors listed in *Holley v. Adams,* supra at 372.

One of the reasons a trial court in Texas may terminate a parent-child relationship is when the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well being of the child." TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon Supp. 1980). The trial court here made such finding.

We believe the above summarized evidence supports the trial court's decision, and all of appellant's points are overruled. The judgment of the trial court is affirmed.

AFFIRMED.

It appearing to the court that the issues involved herein have been settled by clear authority of long standing and present no question or application of any rule of law of interest or importance to the jurisprudence of the State, it is ORDERED, pursuant to TEX. R. CIV. P. 452, that the opinion not be published.

Martin Dies, Jr.
Chief Justice

Opinion published
February 7, 1980

APPENDIX B

IN THE DISTRICT COURT OF ANGELINA
COUNTY, STATE OF TEXAS

NO. 17,430-78-12

IN THE INTEREST OF
HOLLY ELIZABETH FORD
A CHILD

DECREE OF TERMINATION

On the 16th day of April, 1979, trial on the merits was held in this cause.

Petitioner, Mrs. Dorothy Ford and husband, L. B. Ford, Jr. appeared in person and by attorney.

Other parties appearing in person were Cynthia Lou Ford and attorney, Connie M. Mayer.

Also appearing was James Kenneth Ford, father of Holly Elizabeth Ford, and Judy Moss, appointed by the Court as guardian ad litem of the child.

The Court, after examining the pleadings, listening to the evidence and argument of counsel, finds that it has jurisdiction of this cause and the parties. It finds that no other court has continuing exclusive jurisdiction of this cause at this time.

No jury was demanded, and all matters in controversy, including questions of fact and law, were submitted to the Court. All persons entitled to citation were properly cited.

The Court finds that the mother of the child, Cynthia Lou Ford, knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; and failed to support the child in accordance with her ability during a period of one year ending within six months of the date of the filing for termination.

The Court finds the father of the child, James Kenneth Ford, executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided in Sec. 15.03, Texas Family Code, This affidavit of relinquishment has been filed with the papers in this cause.

The Court finds that termination would be in the best interest of the child.

It is therefore ORDERED AND DECREED that the parent-child relationship between James Kenneth Ford, the father, Cynthia Lou Ford, the mother, and Holly Elizabeth Ford, be and is hereby terminated.

The Court further finds that the best interest of the child will be served by appointing the Department of Human Resources of the State of Texas as managing conservator.

IT IS THEREFORE ORDERED AND DECREED that the Department of Human Resources of the State of Texas be and is hereby appointed managing conservator of the child. The managing conservator shall have all of the rights, privileges, duties, and powers provided in Section 14.02, Texas Family Code.

The Court finds that the best interest of the child will be served by appointing Mrs. Dorothy Ford possessory conservator.

IT IS THEREFORE ORDERED AND DECREED that Mrs. Dorothy Ford be and is hereby appointed possessory conservator of the child and shall have the right to reasonable access to the child.

IT IS FURTHER ORDERED AND DECREED that the possessory conservator shall have the following rights, privileges, duties and powers during the period of possession:

(1) The duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(2) The duty to provide the child with clothing, food, shelter, and education;

(3) The power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the child;

The Court finds that it would be to the best interest of the child that the father, James Kenneth Ford be restrained from living in the same home as the child at any time.

IT IS THEREFORE ORDERED AND DECREED that the father, James Kenneth Ford, shall live separate and apart from his daughter, Holly Elizabeth Ford.

SIGNED this the 14th day of June, 1979.

/s/ DAVID WALKER
David Walker, Judge 159th
Judicial District Court, Angelina
County, Texas

APPROVED:

/s/ (Signed other copy in file)
Robert B. O'Keefe, attorney
for Cynthia Lou Ford

/s/ JUDY MOSS
Judy Moss, Guardian Ad Litem
for Holly Elizabeth Ford

/s/ DAN M. BRAZIL
Dan M. Brazil, attorney
for Mrs. Dorothy Ford and
husband L. B. Ford, Jr.

/s/ JANET S. WHITTEN
Child Welfare, Department of
Human Resources of State of
Texas

IN 159TH JUDICIAL DISTRICT COURT
OF ANGELINA COUNTY
STATE OF TEXAS

NO. 17,430-78-12

IN THE INTEREST OF
HOLLY ELIZABETH FORD,
A CHILD

FINDINGS OF FACT

1. The Court finds that James Kenneth Ford executed an unrevoked affidavit of relinquishment of parental rights.

2. The Court finds that it is in the best interest of Holly Elizabeth Ford that the parental rights of James Kenneth Ford be terminated.

3. The Court finds that Cynthia Lou Ford knowingly placed Holly Elizabeth Ford in conditions and surroundings which endanger the physical and emotional well being of the child.

4. The Court finds that Cynthia Lou Ford engaged in conduct and knowingly placed Holly Elizabeth Ford with persons who engaged in conduct which endangers the physical and emotional well being of Holly Elizabeth Ford.

5. The Court finds that Cynthia Lou Ford failed to support the child in accordance with her ability during a period of one year ending within six months of the date of the filing of the petition for termination in said cause.

6. The Court finds that Cynthia Lou Ford is an unfit mother.

7. The Court finds that it is in the best interest of Holly Elizabeth Ford that the parental rights of Cynthia Lou Ford be terminated.

8. The Court finds that it is in the best interest of Holly Elizabeth Ford that the Texas Department of Human Resources be named Managing Conservator of Holly Elizabeth Ford.

CONCLUSION OF LAW

1. The Court, having found grounds for the termination of the parental rights of Cynthia Lou Ford as specified in Sections 15.02 (1) (D), 15.02 (1) (E), and 15.02 (1) (F), Texas Family Code and the Court having further found that termination of the parental rights of Cynthia Lou Ford is in the best interest of Holly Elizabeth Ford, as specified in Section 15.02 (2), Texas Family Code, concludes that the petition to terminate the parental rights of Cynthia Lou Ford should be and is granted.

2. The Court, having found grounds for the termination of the parental rights of James Kenneth Ford as specified in Section 15.02 (1) (K), Texas Family Code and the Court having further found that termination of the parental rights of James Kenneth Ford is in the best interest of Holly Elizabeth Ford, as specified in Section 15.02 (2), Texas Family Code, concludes that the petition to terminate the parental rights of James Kenneth Ford should be and is granted.

3. The Court, having found that it is in the best interest of Holly Elizabeth Ford that the Texas Department of Human Resources be appointed Managing Conservator of Holly Elizabeth Ford, concludes that the Texas Department of Human Resources, an authorized agency, should be and is appointed Managing Conservator as provided in Section 15.05 (B), Texas Family Code.

/s/ DAVID WALKER
Judge David Walker
159th Judicial District Court
Angelina County, Texas

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

Sept. 12, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of FORD v. FORD ET AL., No. B-9309 was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

CLERK'S OFFICE — SUPREME COURT

Austin, Texas

July 30, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9309, CYNTHIA FORD v. DOROTHY FORD ET AL was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX C

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas 77701

Martin Dies, Jr., Chief Justice
Quentin Keith, Associate Justice
Harold R. Clayton, Associate Justice

J. A. Hulgan
Clerk
(713) 835-8402

Judgment entered February 7th, 1980

Cynthia Ford

vs. No. 8404

Dorothy Ford, et al

Appealed from the District Court of Angelina County

Opinion by Chief Justice Martin Dies, Jr.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all cost of this appeal be assessed against the appellant, Cynthia Ford and the surety on her appeal bond, Insurance Company of North America. A copy of this judgment, shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

/s/ JOE A. HULGAN
Joe A. Hulgan,
Clerk

THE STATE OF TEXAS

To the District Court of Angelina County, GREETINGS:

Before our Court of Civil Appeals on the 7th day of February A. D. 1980 the cause upon appeal to revise and reverse your judgment between

Cynthia Ford

No. 8404 and

Dorothy Ford, et al

was determined; and therein our said Court of Civil Appeals made its order in these words:

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all cost of this appeal be assessed against the appellant, Cynthia Ford and the surety on her appeal bond, Insurance Company of North America. A copy of this judgment, shall be certified below for observance.

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Civil Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness, the Hon. MARTIN DIES, JR., Chief Justice of our said Court of Civil Appeals of the Ninth Supreme Judicial District of Texas, with the Seal thereof annexed, at the City of Beaumont, this the 22nd day of September A. D. 1980

JOE A. HULGAN
Clerk

By /s/ SHIRLEY FORREST, Deputy

C-3

COURT OF CIVIL APPEALS

Ninth Supreme Judicial District

Beaumont, Texas 77701

Martin Dies, Jr., Chief Justice
Quentin Keith, Associate Justice
Harold R. Clayton, Associate Justice

J. A. Hulgan
Clerk
(713) 835-8402

February 28, 1980

Mr. Robert O'Keefe, Attorney
East Texas Legal Services
P. O. Box 1069
Nacogdoches, Texas 75961

Mr. Dan Brazil, Attorney
P. O. Box 7
Lufkin, Texas 75901

In Re: No. 8404, Cynthia Ford vs. Dorothy and L. B. Ford

Gentlemen:

The Appellant's Motion for Rehearing in the above styled and numbered cause was overruled on February 28, 1980.

Very truly yours,

By: /s/ SHIRLEY FORREST, Deputy

Joe A. Hulgan,
Clerk

APPENDIX D

SUMMARY OF EVIDENCE

Petitioner, Cynthia Ford, is the natural mother of Holly Elizabeth Ford, a five year child born of her marriage to Kenneth Ford. (Tr. 2-3, S.F. 7) Cynthia, who is twenty-seven years of age, married Kenneth at the age of eighteen, after dropping out of school in the eleventh grade. (S.F. 156) Holly Elizabeth is her only child. (S.F. 80) Cynthia cannot have any more children. (S.F. 344)

Respondents, Dorothy and L. B. Ford, are the paternal grandparents of Holly Elizabeth. (S.F. 5)

The marriage between Kenneth and Cynthia was a difficult one, beset with problems, resulting in two separations in 1978. (S.F. 22, 378-379) The marriage had deteriorated to the point that Petitioner had slept with two other men. (S.F. 183) A petition for divorce was filed by Cynthia prior to the trial of this case. (S.F. 178)

Generally speaking, Respondents' witnesses testified to their concern over the conditions of the homes which Cynthia lived in, the severe financial difficulties which Kenneth and Cynthia encountered, Cynthia's personal life during the time in which her husband was incarcerated, and the manner in which she disciplined her daughter.

Chief among those witnesses testifying in support of the termination of Cynthia's rights was the Respondent, Dorothy Ford. Regarding the living conditions of Kenneth and Cynthia, Ms. Ford initially described them as "poorly". (S.F. 15) Of great moment to Mrs. Ford, was the maintenance of "six or seven animals" in their home

because of the "foul odor" which was caused; although she admitted that Cynthia and Kenneth had "tried to clean it up" noting, however, that "the odor was still there." (S.F. 18) Additionally, Mrs. Ford was able to identify one home in which Petitioner lived which had rats. (S.F. 24) This she knew because Petitioner had borrowed rat traps from her and had been successful at catching at least one. (S.F. 24, 161, 162) Mrs. Ford also testified, of her town knowledge, that all of the homes in which Petitioner lived in were heated and had running water. (S.F. 24)

The most telling testimony which Mrs. Ford offered on this issue came when she was asked whether Cynthia's living conditions were sanitary to which she candidly remarked "well, yes but cluttered." (S.F. 18) Mrs. Ford's testimony was based on her observation of the homes "at least once or twice a week." (S.F. 24)

Respondent L. B. Ford also gave testimony regarding the condition of Cynthia's homes. First, Mr. Ford admitted that he had visited the homes of Kenneth and Cynthia "very few times." (S.F. 40) However, based on those very few visits Mr. Ford concluded, reluctantly, that the homes were unsanitary. (S.F. 41) Asked to describe the conditions which led him to this conclusion he stated, "I went in and seen stuff where she took it out of the refrigerator and maybe been in the sink three or four days and dried over in the bowls." (S.F. 41) Nothing further was offered by Mr. Ford in support of his conclusion that Petitioner's homes were unsanitary. However, he was able to confirm Mrs. Ford's testimony that Petitioner's homes were heated, had electricity and running water. (S.F. 40-41)

Respondents also called Mr. Arlis Havard, the natural father of Cynthia, to further bolster their testimony regarding her living conditions. Mr. Havard testified that he had visited his daughter in her home *once* since Holly Elizabeth had been born. (S.F. 72) This visitation had taken place "a couple or three years" prior to the trial of their case. (S.F. 73) In Mr. Havard's opinion, the house was not clean. (S.F. 80) Like Mrs. Ford, he cited the maintenance of "four, five, six or seven" dogs in the house as being the principal problem. (S.F. 80-81)

Respondents called two additional witnesses who offered testimony about the living conditions of Petitioner. Mrs. D. D. Burke, the seventy-two year old grandmother of Kenneth Ford, testified that she wouldn't go in Petitioner's home "because it was too many dogs over there" but nevertheless had seen "the house", and classified it unsanitary. (S.F. 102-103) This witness, as those before her, found the odor of the dogs as being the most offensive element in the home. (S.F. 103, 108-109)

Ms. Doris Burns, a former next door neighbor of Cynthia, testified that she had viewed the home *after* Cynthia moved out and found it "awful dirty." (S.F. 93) Later Ms. Burns changed her description from "awful dirty" to "filthy" citing the condition of the refrigerator and stove as the main problems. "The stove" Mrs. Burns particularized, "had grease from one end to the other . . ." (S.F. 94) Mrs. Burns, who was "paid to see after" the home utilized a cleaning service to clean the home. (S.F. 95).

Additionally, Respondents challenged the manner in which petitioner disciplined her child. In this regard, Mrs. Dorothy Ford testified she had seen Cynthia slap her

daughter on four occasions in five years. (S.F. 18-19) Mrs. Ford observed that, on those occasions, the slap left temporary red marks on Holly but that they did not develop into bruises. (S.F. 19). She further stated that those actions were taken as disciplinary measures in response to some inappropriate conduct by Holly Elizabeth. (S.F. 28) Mrs. Ford saw this conduct by Cynthia as constituting abuse and endangerment of the physical well-being of Holly Elizabeth. (S.F. 18, 34) Further, she pointed to the use of certain abusive language by Cynthia and the selling of some of Holly Elizabeth's toys which she had bought as constituting the only other abuse toward the child which was evident to her. (S.F. 34) The examples of abusive language which Mr. Ford gave were two: "Why don't you shut your goddam mouth" and "I'm going to beat your ass off." (S.F. 19) Significantly, Mrs. Ford failed to identify when or where this language was used and attributed the use of the foul language to both parents (S.F. 19) However, she did emphasize that, in her opinion, the child reacted negatively to this language and requested her parents to "let me alone." (S.F. 19) Finally, Mrs. Ford's testimony revealed that she is generally against the use of corporal discipline and especially as it would relate to Holly Elizabeth. (S.F. 293)

Mr. L. B. Ford stated that he had seen Cynthia "abuse" the child "five or six times" in five years. (S.F. 41-42) Like his wife, Mr. Ford described this abuse as Cynthia slapping Holly Elizabeth and using abusive language. (S.F. 48) He admitted that these actions had been taken as disciplinary measures but felt that "they went at it the wrong way." (S.F. 42)

Ms. D. D. Burke also offered testimony on this issue. in response to respondents' counsel's question about

whether she had occasion to observe the way they (Kenneth and Cynthia) treated Holly Elizabeth, she quickly quipped "nothing only storming at her and cussing." (S.F. 98) Further questioning disclosed her feeling as to why her parents had acted in that fashion: "Because she (Holly Elizabeth) was a child . . . A child is going to be a child." (S.F. 98) Ms. Burke, also recalled an event, two and one-half years prior to trial, where Cynthia had slapped the child on the shoulders and she had fallen to the floor. (S.F. 111) Ms. Joyce Williams, a witness called by respondents, testified she had never seen Cynthia strike the child (S.F. 132) but did observe that Cynthia "got on the child and she fussed at her." Ms. Williams had heard this fussing on three or four occasions; (S.F. 138) but when pointedly asked her to repeat the language she adamantly refused, making the opaque suggestion that "it was a bad word." (S.F. 139)

Additionally, Respondents put on evidence of the economic hardship which Kenneth and Cynthia encountered. This resulted in their having to seek financial and other support from friends and relatives. (S.F. 8, 9, 157, 158, 367) Moreover, they had, on occasion, received food stamps and financial help from their church. (S.F. 158) The problem was particularly evident when Kenneth was not employed. (S.F. 157, 361) Unfortunately, Kenneth changed jobs frequently and his intermittant period of unemployment facilitated the necessity of turning to relatives for assistance. (S.F. 157, 367) Respondents were among those who provided some assistance. In particular, Mrs. Dorothy Ford was dismayed by the fact that she had purchased medicine for Holly Elizabeth on "maybe eight" occasions *and* that when she was invited to supper she felt need to take "food with me to fix." (S.F. 16-18)

Mr. L. B. Ford, couldn't give an estimate of how much he had spent on Kenneth and Cynthia but did observe it was a "good bit." (S.F. 37)

There was also lay opinion testimony about whether Holly Elizabeth ever went "hungry" as a result of Kenneth and Cynthia's poverty. Mrs. Dorothy Ford was "sure she has went hungry" (S.F. 27) but readily admitted that the child had never been medically diagnosed as being malnourished. (S.F. 23) The testimony revealed Mrs. Ford's conclusion to be based on the sole fact that, from time to time, Kenneth and Cynthia had requested assistance from her. (S.F. 26-27) Likewise, Mr. L. B. Ford was of the opinion that Holly Elizabeth "has been hungry," however, his conclusion was bottomed on his belief that he "could tell that by whenever she come to my house." (S.F. 39) Mr. Ford denied any knowledge of whether Holly Elizabeth received three meals a day although he testified that he "supposed" they recognized their need to provide Holly Elizabeth with food. (S.F. 39)

Ms. D. D. Burke stated that she had seen Holly Elizabeth go "hungry many times with the only source of food being welfare." However, on further questioning she stated that *all* she knows is that the only food she had seen Kenneth and Cynthia purchase were "potato chips and cokes." (S.F. 103) Respondents' other witnesses failed to offer any testimony on this point except Mr. Arlis Havard who stated Holly Elizabeth "looked pretty normal to him." (S.F. 75)

Respondents also attacked Cynthia's personal life, her problem with the law, an her commitment to the Rusk State Hospital. The evidence showed that on or about October 27, 1978, Cynthia contacted Dorothy Ford and

requested that she temporarily take Holly Elizabeth because she thought she might be in trouble with the law. (S.F. 6, 190) Shortly thereafter, she contacted Respondents and requested the return of the child. (S.F. 173) Respondents not only denied her request but threatened her with arrest if she came after her daughter and further advised her she would not get her child back. (S.F. 174, 252) Her husband Kenneth was in jail at this time. (S.F. 172) Despondent over this prospect, Cynthia took "four or five" sleeping pills. (S.F. 197-198) The overdose was not deliberate. (S.F. 198)

On November 1, 1978, Ms. Martha Massey, Cynthia's mother, committed her to the Rusk State Hospital. Ms. Massey committed Cynthia in wake of the overdose because in her opinion it was "best for her to be there and have treatment." (S.F. 252) Cynthia had not taken an overdose of medication prior or subsequent to that event. (S.F. 199, 252)

The testimony also established that in January of 1979 Cynthia was convicted on a charge of perjury in connection with a charge of arson against Kenneth. (S.F. 201, 202) Petitioner was granted probation while her husband, who was convicted on the arson charge was incarcerated in Huntsville, Texas. (S.F. 49, 201)

Finally, the evidence revealed that during one of the occasions her husband was in jail Cynthia had stayed in a motel room with another man while her child slept in the same room. (S.F. 212) In this regard there was no evidence to establish sexual relations on this occasion. In fact, the evidence revealed that they had waited until Holly Elizabeth had gone to sleep before doing the same themselves. (S.F. 212)

Petitioner's witnesses categorically refuted Respondents' allegations of unsanitary living conditions, abuse of the child, or that Petitioner had allowed the child to go hungry by failing to provide Holly Elizabeth with an adequate supply of food. With respect to her living condtiions, Cynthia testified that all of the homes that she had lived in since Holly Elizabeth was born were clean, sanitary and adequate in all respects. (S.F. 158-163) This testimony was verified by Cynthia's mother, Martha Massey, who testified that the homes in which her daughter lived were sanitary and provided adequate shelter for their family. (S.F. 242, 243) Ms. Louise Cain, a long time neighbor of Dorothy and L. B. Ford, also testified that she had been in every house in which Kenneth and Cynthia had lived, and that they were always clean and sanitary. (S.F. 307) Ms. Cain was the only witness to testify that she had had an opportunity to observe all of the homes in which Kenneth and Cynthia lived. Finally, Ms. Mary Dell Williams, Petitioner's sister observed that Cynthia homes "were clean and they all had the proper facilities in them." (S.F. 337)

In reference to the testimony regarding "physical abuse," Cynthia stated that she had never slapped Holly Elizabeth in the face, but had slapped her on the shoulders. (S.F. 194) She further testified that she had never cursed Holly Elizabeth but had on occasion, used curse words in front of her daughter. (S.F. 203, 204) Cynthia's testimony was verified by Ms. Louise Cain, who testified that Cynthia had not disciplined Holly Elizabeth in an inappropriate fashion, nor had Cynthia used abusive language toward the child. (S.F. 312) Ms. Mary Dell Williams, Cynthia's sister, supported this testimony by stating that Cynthia's discipline of Holly Elizabeth was

appropriate on all occasions that she observed. (S.F. 334) In this regard, Mr. Arlis Havard, a witness called by Appellees, stated that he had never seen Cynthia strike her daughter. (S.F. 79)

Moreover, Petitioner's witnesses were in substantial disagreement with those of Respondents as to whether Holly Elizabeth was properly fed. Ms. Mary Dell Williams flatly stated that she had never seen Holly Elizabeth go "hungry." (S.F. 335) This fact was confirmed by Ms. Louise Cain who was "never in her house whenever there was not food there . . . there was always food and the baby eat (sic) at any time she wanted to." (S.F. 308) Moreover, Ms. Martha Massey confirmed Ms. Cain's statement, by stating that she had not seen the child go hungry. (S.F. 244) On this issue Petitioner candidly and simply stated "she (Holly Elizabeth) has always had food." (S.F. 163)

Finally, it is significant, if not of critical importance to these issues, to note that Holly Elizabeth had never been professionally diagnosed as being emotionally harmed or in danger of being emotionally harmed. (S.F. 298) While Respondent Dorothy Ford, admitted this, she remained undaunted in her belief:

> Q: So at this point and time you don't know whether Holly has been emotionally damaged or not? There is no evidence that she has been?
>
> A: No, other than what I have observed. (S.F. 298)

* * *

Additionally, undisputed evidence shows that Petitioner was employed at the Dependable Catering Service in

December of 1977 and that the money earned from this employment was used for the benefit of the child. (S.F. 156, 366) Further, the testimony established that Petitioner supported her child by staying home and caring for her child's daily needs (S.F. 164-170), while her husband Kenneth worked to obtain the necessary financial support for the family. (S.F. 354-359) This was in accordance with her belief that it would be better for the child emotionally, as well as her husband's desires. (S.F. 156-157, 250, 365) Moreover, the record established that during the statutory time period her husband Kenneth was working and the money from his employment was used for the benefit of the child. (S.F. 157, 354-359)

The record also established that, during the times that Kenneth was unemployed, Cynthia was actively seeking and getting support and assistance from friends and relatives for the entire family. (S.F. 26, 37, 56, 77, 163, 243-245, 308-309, 334-335, 361-362) Finally, the evidence revealed that Cynthia had no meaningful job training, an eleventh grade education and had held three jobs in her life. (S.F. 156)

* * *

The only witness who testified extensively regarding the best interest of the child was Ms. Jan Whitten, an intake worker for the Department of Human Resources Child Protective Unit. (S.F. 266) She had been with the department for four years and had received most of her training from on the job experience. (S.F. 286) She carried out her duties by discussing the matter with the family, unidentified collateral contacts, by observing Cynthia together with Holly Elizabeth on eight occasions,

and her "observations" of her contacts with Cynthia during a four month period of time (S.F. 267, 268) As a result of her study, Ms. Whitten was able to reach several conclusions. First, she concluded that Holly Elizabeth suffers from a lack of impulse control. (S.F. 267, 270) Second, she found that there was a strong loving relationship between Holly Elizabeth and her mother. (S.F. 271, 272) Third, she found that Holly Elizabeth was always anxious to see her mother, happy to be with her mother, and disappointed, sometime to the point of tears, to leave her mother. (S.F. 273) She further found that to separate Holly Elizabeth from her mother could leave emotional scars on Holly Elizabeth, if it was not handled right. (S.F. 273, 274) Additionally, Ms. Whitten opined that Holly Elizabeth suffered a conflict from her visitation with her mother because Holly Elizabeth does not feel the freedom to express affection for her mother outside of the realm of Ms. Whitton and her mother. (S.F. 275) Ms. Whitten found this to be the danger to Holly Elizabeth if contact with her mother continued. (S.F. 276) Ms. Whitten believed that Holly received disapproval whenever she expressed affection for her mother. (S.F. 275) Ms. Whitten further stated that no psychiatric evaluation had been done of Holly Elizabeth. (S.F. 277)

Additionally, Ms. Whitten found a distinct improvement in Holly Elizabeth's behavior since she had been in the custody of the Respondents. Of particular importance to Ms. Whitten was the fact that Holly Elizabeth's manners had improved, that she had learned respect and her use of foul language had diminished. (S.F. 278) Finally, Ms. Whitten candidly stated that she could not put a label on any damage done to the child. (S.F. 281)

Ms. Whitten testified that Cynthia Ford's rights should be terminated because of life pattern and dependency on others which indicated that she cannot care for the child in a way which would be in the best interest of the child. (S.F. 268) She feared that this dependency might endanger the child, if those upon whom she was dependent, could no longer be depended upon. (S.F. 287) Finally, she opined that Petitioner would not effect an "independent type of arrangement" which she believed was mandatory. (S.F. 286, 287) Ms. Whitten did not advise what type of danger the child would be placed in because of this perceived problem. Nor is it any surprise that she failed to do so. The simple fact is, supported by record evidence, that Cynthia Ford had always seen to it that Holly Elizabeth was more than adequately cared for, and when she or her husband were unable to provide for Holly, Cynthia was effectively able to obtain the necessary care from relatives and friends. (S.F. 8, 9, 26, 37, 56, 77, 157, 158, 163, 308, 334-335, 361-362, 367)

Regarding the desires of the child there was simply no testimony. However, as to the emotional and physical needs of the child, now and in the future, no witness testified that there was not a loving and emotional relationship between Holly Elizabeth and her mother. In fact, those witnesses who had had an opportunity to observe their interaction, confirmed the strength of the bond between mother and child (S.F. 72, 272, 273, 288)

In looking to the parental abilities of Petitioner, the record in the trial court firmly established that Cynthia took jealous care of her child, providing her adequate food, clothing, shelter, and medical attention. (S.F. 8, 9,

26, 37, 77, 163, 308, 367) There was *no* evidence that Cynthia's ability to be a proper parent fell below that which is necessary. This was supported by Ms. Ford's inability to articulate any damage done to Holly Elizabeth by Cynthia's alleged lack of parenting ability. (S.F. 298)

Moreover, Ms. Whitten advised that there were programs available to aid Appellant to overcome the deficiencies which she saw in Cynthia. (S.F. 200) In this regard, Ms. Whitten stated that she felt that Cynthia would not sincerely avail herself of these programs, because she failed to complete prior programs which had been established for her in late December of 1978 and the early part of 1979 (S.F. 282-285) However, Ms. Whitten failed to take into account Petitioner's transportation problems; (S.F. 200) the fact that she was coming out of a very difficult marriage; (S.F. 22, 378-379) that Respondents were refusing to return her child; (S.F. 173) that Petitioner had had a recent stay in a mental hospital; (S.F. 197, 252) and that she had been in trouble with the law, all occurring during this time period. It is difficult, if not impossible, to discern how anyone who had experienced these problems could turn their energies to job programs or counseling.

With regard to the stability of the home and Petitioner's plans for the child, it was clear to Ms. Whitten that Cynthia's home life was far more stable now. (S.F. 278) Moreover, the plans which Cynthia had stated that she had for the child (S.F. 180-182) were not challenged as being inadequate or improper. Also, Mr. Flanagan stated that he loved Cynthia and they intended to marry and that he would make a proper home and help care for Holly Elizabeth. This evidence was not disputed.

Additionally, there was testimony that, on one occasion, Petitioner had slept in the same bed with another man, while her child was sleeping in the same room. (S.F. 184)

On the issue of the child's best interest Respondents' offered scant testimony. Ms. Dorothy Ford was of the opinion that she had "a real fine relationship" with Holly Elizabeth (S.F. 8) She also believed the child was "doing better at this time". (S.F. 9) Although Mr. L. B. Ford was of the opinion that termination of Petitioner's rights was in the best interest of the child; he was never able to express why other than his judgment that they "can't provide for them". (S.F. 46) Additionally, Respondents produced Mr. M. L. Warner who, based on limited observation of the child, testified that Holly Elizabeth was presently "cleaner, better mannered" since being in the custody of the Respondents. Also, Ms. Grace Hambrick offered her observation that child was "better off" in possession of Respondents because she was treated better. (S.F. 145) Ms. Grace Hambrick is Mrs. Dorothy Ford's sister. (S.F. 147)

APPENDIX E

EXCERPTED PORTIONS OF BRIEF ON APPEAL

COURT OF CIVIL APPEALS

APPELLANT'S POINTS OF ERROR

POINT OF ERROR 1.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT HAD KNOWINGLY PLACED OR KNOWINGLY ALLOWED THE CHILD TO REMAIN IN CONDITIONS OR SURROUNDINGS WHICH ENDANGERED THE PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILD BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 2.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT HAD KNOWINGLY PLACED OR KNOWINGLY ALLOWED THE CHILD TO REMAIN IN CONDITIONS OR SURROUNDINGS WHICH ENDANGERED THE PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILD BECAUSE THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 3.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT HAD ENGAGED IN CONDUCT OR KNOWINGLY PLACED THE CHILD WITH PERSONS WHO ENGAGED IN CONDUCT WHICH ENDANGERED THE PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILD BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 4.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT HAD ENGAGED IN CONDUCT OR KNOWINGLY PLACED THE CHILD WITH PERSONS WHO ENGAGED IN CONDUCT WHICH ENDANGERED THE PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILD BECAUSE THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 5.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT FAILED TO SUPPORT THE CHILD IN ACCORDANCE WITH HER ABILITY DURING A PERIOD OF ONE YEAR ENDING WITHIN SIX MONTHS OF THE DATE OF THE FILING OF THE PETITION BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH A FINDING AND CONCLUSION.

POINT OF ERROR 6.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT FAILED TO SUPPORT THE CHILD IN ACCORDANCE WITH HER ABILITY DURING A PERIOD OF ONE YEAR ENDING WITHIN SIX MONTHS OF THE DATE OF THE FILING OF THE PETITION BECAUSE THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 7.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT TERMINATION WOULD BE IN THE BEST INTEREST OF THE CHILD BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH A FINDING AND CONCLUSION.

POINT OF ERROR 8.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT TERMINATION WOULD BE IN THE BEST INTEREST OF THE CHILD BECAUSE THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 9.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT WAS AN UNFIT MOTHER BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH FINDING AND CONCLUSION.

POINT OF ERROR 10.

THE TRIAL COURT ERRED IN TERMINATING APPELLANT'S PARENT-CHILD RELATIONSHIP ON THE BASIS THAT APPELLANT WAS AN UNFIT MOTHER BECAUSE THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT SUCH FINDING AND CONCLUSION.

PREFACE TO ARGUMENTS

Appellant's Points of Error are based upon the Appellees' failure to carry their burden of proof. Because there are some principals which are so fundamental in our jurisprudence, that they commonly apply to all of the Points of Error raised in this Brief, Appellant hereby sets them forth in this Preface to Arguments.

Since this country's earliest beginnings, its people have traditionally recognized certain fundamental liberties that are so important that they are deserving of the protection of the 1st and 14th Amendments to the United States Constitution, *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937); *Wisconsin v. Yoder,* 406 U.S. 205 (1965); and *Griswold v. Connecticut,* 381 U.S. 478 (1965). A parent's right to the companionship and management of their children is one of those liberties, having a basis in natural law around which evolved strict constitutional protection, *Meyer v. Nebraska,* 262 U.S. 390 (1923).

The Supreme Court of the United States has frequently emphasized the importance of parent's rights to companionship, care, custody and management of their children, the same being recognized as one of the "basic civil rights of man," *Skinner v. Oklahoma,* supra at 541.

The basic integrity of the family unit is protected not only by the due process clause of the 14th Amendment to the Constitution of the United States, *Meyer v. Nebraska,* supra at 399, but also the Equal Protection Clause of the 14th Amendment, *Skinner v. Oklahoma,* supra at 541.

Likewise, our Texas Supreme Court has recognized the fundamental and constitutional dimensions of the parent-child relationship, *Holley v. Adams,* 544 S.W.2d 367 (1976); *Wiley v. Spratlan,* 543 S.W.2d 349 (1976); *Herrera v. Herrera,* 409 S.W.2d 395 (1966).

As a result of these Federal and State Court decisions, it is simply beyond question that the parent-child relationship is one of substantial constitutional dimension which cannot be broken without "solid and substantial reasons," *Wiley v. Spratlan,* supra at 352. Unlike conservatorship proceedings, the Court, in trying a termination case must consider not only the best interests of the child but also whether the petitioners have discharged their burden in establishing that the parents have engaged in conduct violative of § 15.02 (1) of the Texas Family Code. A violation of at least one of the elements of § 15.02 (1) must be proven in conjunction with establishing that termination is in the best interest of the child, before judgment may be granted. In this State, there is a strong presumption, that the best interest of the child will be served by leaving it with its natural parents. This presumption is based upon the logical belief that the ties of the natural parent to the child ordinarily furnish a strong enough assurance of genuine efforts on the part of the parents to provide the child with the best care and opportunity possible, *Mumma v. Aguirre,* 364 S.W.2d 220 (1963).

It is for these reasons that our Texas Supreme Court has made it very clear that the evidence and proceedings in a parent-child termination case, where parental rights have been terminated, must be "closely scrutinized," *Wiley v. Spratlan,* supra at 352.

APPENDIX F

EXCERPTED PORTIONS OF MOTION FOR REHEARING

COURT OF CIVIL APPEALS

ARGUMENT UNDER ASSIGNMENTS I, II, III AND IV

The parent-child relationship is one deserving of constitutional protection which cannot be severed except for the "most solid and substantial reason". *Wiley v. Spratlan,* 543 S.W.2d 349, 352 (1976). Of course, this view is founded on a judicial recognition that "the custody, care and nurture of the child reside first in the parents. . . ." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). It is for this reason that our United States Supreme Court has accorded both procedural and *substantive* constitutional protections to any effort to disturb the parent-child relationship. *Smith v. Organization of Foster Families,* 431 U.S. 816, 842 (1977). In accordance with these fundamental precepts, the Texas Supreme Court has mandated that the record in a case where the parent-child relationship has been severed must be "strictly scrutinized". (Holly v. Adams, 544 S.W.2d 367, 370 (1976).

Applying this principle to the case *sub-judice,* Appellant submits that there was no evidence or insufficient evidence to support the district court's finding under § 15.02(1)(D) & (E).

Essential to a finding that a parent has violated either section 15.02(1)(D) or (E) is evidence that the conduct of the parent endangered the physical or emotional well-being of the child. *Holley v. Adams,* supra 544 S.W.2d at 370. Here the Appellees produced no witness who was able to testify to the endangerment of the child by any of Appellant's conduct. Thus, in affirming the termination of Appellant's parental rights it appears[1] that this court has found that the district court, based on the evidence produced at trial, could permissably infer that Appellant's conduct endangered the physical or emotional well-being of the child. Appellant respectfully disagrees.

It is fundamental that for a court to permissably infer an elemental fact, the evidence from which the fact is inferred must be of such a nature and character that based on "data founded by common experience" natural reason draws one to that conclusion. *Ice Service Co. v. Scruggs,* 284 S.W.2d 185 (Civ. App. Ft. Worth 1955).[2] The evidence, even as reviewed by this Court in its opinion, does not rise to level of allowing the trial court to infer this necessary fact.[3]

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1. In its opinion this Court did not identify any direct evidence that Appellant's conduct endangered the child.

2. It might be argued that the showing that the child was endangered is the "ultimate fact" in a 15.02 (1) (D) & (E) allegation. Viewing it as the "ultimate fact" it is clear that the inference cannot be drawn, if reasonable minds might differ as to the inference to be drawn. *Prudential Insurance v. Krayer,* 366 S.W.2d 779 (1963). Taking either perspective, the evidence in this case does not allow the inference.

3. This Court seemed to place great weight on the fact that Appellant had been committed to Rusk and had been convicted for perjury. In *Holley v. Adams,* supra at 370-371, the Supreme Court, when faced with a parent who had also been committed to Rusk and had been introuble with the law, found that there was *no evidence* that this conduct endangered the child. Of course, the same is true here.

Evidence that a person may be something less than a model parent is simply an insufficient basis upon which to terminate parental rights. See, e.g. *Holley v. Adams,* supra.

This is precisely the type and character of the evidence produced here, and Appellant submits that the judgment terminating Appellant's rights under these sections cannot stand. To hold to the contrary is not only in conflict with the principles laid down by our Texas Supreme Court in *Holley v. Adams,* supra, but would violate Appellant's right to substantive due process under the Fourteenth Amendment to the Constitution of the United States. See, e.g., *Moore v. East Cleveland,* 431 U.S. 494, 502-503 (1977).

ARGUMENTS UNDER ASSIGNMENTS V AND VI

The district court's finding under § 15.02(1)(F) cannot be allowed to stand for the following reasons:

First, the term support does not mean financial support from one's own pocketbook or that the parent must be employed during the relevant time period. *Heard v. Bauman,* 443 S.W.2d 715, 719 (1969). Moreover, the evidence disclosed that Appellant was completely responsible in seeing to it that her child was cared for at all times. Of course, this effectively bars termination on this issue.

Second, assuming *arguendo* that support did mean financial support, it is clear that Appellant used money from her own employment to support the child during the relevant time period (S.F. 156, 366), the effect of which is to foreclose termination under this portion of the statute.

Third, community property (husband's income) was used to support the child during the relevant time period, and must be deemed to be the support of Appellant, the effect of which is to make termination for failure to support wholly improper.

Fourth, there was no showing that Appellant had any greater ability to support her child as is required by the statute.

Fifth, that to find the evidence in this case sufficient to terminate Appellant's rights under § 15.02(1)(F) violates Appellant's rights to substantive due process under the Fourteenth Amendment of the Constitution of the United States, inasmuch as there was no evidence to support this finding.

ARGUMENT UNDER ASSIGNMENTS VII, VIII, IX AND X

This Court has found that the evidence supports the trial court's determination that termination of the parent-child relationship is in the best interest of the child and that Appellant is an unfit mother.[4]

In Texas, there is a strong presumption that the best interest of the child is served by keeping custody in the natural parents and avoiding, where possible, the termination of parental rights. *Wiley v. Spratlan,* supra, 543 S.W.2d at 352. There was no evidence on this issue which was sufficient to overcome this presumption in favor of

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4. The district court's finding that Appellant is an unfit mother is gratuitous to its finding that the best interest of the child would be served by the termination. *Brokenlegg v. Butts,* 559 S.W.2d 853 (Civ. App. El Paso, 1977). Appellant's arguments to challenge both findings are the same.

Appellant, and accordingly, the trial court's findings here, and this court's affirmance thereof are not supported in the record.[5] Simply put, the evidence is not sufficient to

5. In its opinion (p. 5) this Court seems to suggest that the best interest of the child test should be weighed heavily in determining whether to terminate the parent-child relationship and in reviewing the record, this court may have applied such an analysis to the instant case. Significantly, one effect of such an analysis could be that where there is substantial evidence that the best interest of the child would be served by termination, it might be utilized to lighten an otherwise heavy burden on a petitioner, who had inadequately struggled to establish a § 15.02 (1) violation. Of course, in Texas both elements must be conclusively established. See, e.g., *Holley v. Adams*, supra.

APPENDIX G

EXCERPTED PORTIONS OF APPLICATION FOR WRIT OF ERROR

TEXAS SUPREME COURT

It is now elemental that the parent-child relationship is one of constitutional dimensions shrouded with the protection of the Fourteenth Amendment to the Constitution of the United States. *Stanley v. Illinois,* 405 U.S. 645, (1972). The natural ties between a parent and child should not and cannot be broken in this state, except for the most "solid and substantial reasons." *Wiley v. Spratlan,* 543 S.W.2d 349, 352 (1976). Moreover, the record in a case where there has been termination must be "strictly scrutinized." *Wiley v. Spratlan,* supra at 342.

It is for these reasons that this Court has recently held that the bond between mother and child shall not be broken unless the party requesting the same proves their allegations by clear and convincing evidence. *In the Interest of G.M.* et al, ____S.W.2d____, 23 Tex. Sup. Crt Jrnl. 262 (1980).

In so holding, this court delineated the burden as follows:

> "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."

Id at 263

* * *

The district court also found and the Court of Civil Appeals sustained the finding that Petitioner placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child. A review of the record in this case established that the only persons who Petitioner placed the child with were the Respondents in this case and her own mother, Mrs. Martha Massey. Quite frankly, there was *no* testimony that any of these persons engaged in conduct which endangered the well-being of the child. Accordingly, Respondents failed to establish this allegation by clear and convincing evidence or any evidence at all.

In *Holley v. Adams,* supra 544 S.W.2d at 371, a case strikingly similar to the case at bar, this Court held that there must be *some* evidence which bears upon the bringing into danger or peril the well-being of the child. However, like the record in the *Holley* case, the record here is totally barren on this elemental fact. Accordingly, Petitioner submits that there was *no* evidence of probative force to support the findings of the district Court under § 15.02(1)(D) and (E) and the Court of Civil Appeals affirmance thereof should not and cannot be allowed to stand. The holdings of the lower courts are not only contrary to established precedent of this Court but have operated to deprive Petitioner of her rights to substantive due process of law, by applying § 15.02(1)(D) and (E) in a manner which does not require Respondents to establish, by clear and convincing evdience, that Cynthia's conduct, or the conduct of persons she placed the child with, endangered the physical or well-being her daughter, Holly Elizabeth Ford. See, e.g. *In the Interest of G.M.L,* et al, supra at 263. For these reasons Petitioner submits that the holding of the lower Courts under § 15.02(1)(D) and (E) must be reversed.

APPENDIX H

EXCERPTED PORTIONS OF MOTION FOR REHEARING

TEXAS SUPREME COURT

Article 15.02(1)(D) and (E) of the Texas Family Code requires that if termination is to be founded upon either or both of these subsections it is encumbent on the party so moving to establish that the challenged act(s) or conduct "endangers the physical or emotional well-being of the child". It is one of the three essential elements of the prosecution under either subsection of the statute.[1] This Court has held that these facts must be established in such a fashion that the trier of fact is left a "firm belief or conviction as to the truth of the allegations sought to be established." *In the Interest of G. M.*, ____S.W.2d____, 23 Tex. Sup. Crt. Jrnl. 262 (1980). This substantial burden finds its mandate in the due process clause of the Fourteenth Amendment to the Constitution of the United States, which has been consistently viewed as according both procedural and substantive protections against state's unwarranted intrusion into the family unit or into matters of family integrity. See e.g. *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Eisenstadt v. Baird,* 405 U.S. 438

1. The other two are, of course, the establishment of the act(s) or conduct itself and that the accused had committed the act *knowingly*.

(1972); *Skinner v. Oklahoma,* 316 U.S. 535 (1942) and *Smith v. Organization of Foster Families,* 431 U.S. 816 (1977). The ties within a natural family unit are, without a doubt, the most essential of those areas of family integrity which are accorded protection, not only because its origins are apart from the power of the state and it is so firmly steeped in this nation's history and tradition, but because it is through the family that we "inculcate and pass down many of our most cherished values, moral and cultural". *Moore v. East Cleveland,* 431 U.S. 94, 503-504 (1977).

It is for this reason that the United States Court of Appeals for the Fifth Circuit has recently pronounced that the possible deprivation of the liberty interest which is so deeply ingrained in the family unit, is analogous to that which the individual suffers in a criminal prosecution. *Davis v. Page,* 618 F.2d 374, 379, 382 (5th Cir. 1980). Given these views, it is not difficult to recognize the underpinnings of this Court's requirement that the ties between parent and child cannot be broken except for the most "solid and substantial reasons." *Wiley v. Spratlan,* 543 S.W.2d 349, 352 (1976). This Court's holding mirrors the view that substantive due process includes a "freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the . . . needs asserted to justify their abridgement". *Moore v. East Cleveland,* supra, 431 U.S. at 502. Moreover, the requirement of our legislature that there be evidence of acts or conduct which endangers the physical or emotional well-being of the child would appear to be, on its face, consonant with the mandate of

substantive due process. It is, in its simplest terms, reflective of the view that the parent-child relationship should not be broken unless there is some showing of harm or a substantial likelihood of harm from the established acts.

To apply it otherwise would clearly run afoul of substantive due process. However, Petitioner respectfully submits that is precisely what has happened in the instant case.

Carefully scrutinizing this record reveals that the evidence focused itself entirely upon alleged acts and conduct of Petitioner without a shred of evidence regarding the actual harm they had on the child or probability that this conduct would harm or endanger the child.

Petitioner submits that proof on this issue is essential to Respondents' cause and that the failure to put on evidence on this issue or evidence which is probative to the factual question of endangerment is fatal to the allegations made under § 15.02(1)(D) and (E) and this Court should so hold. See, e.g. *In the Interest of Hare,* 509 S.W.2d 856 (Civ. App. Texarkana, 1980). Nothing less is required by the Fourteenth Amendment to the Constitution of the United States and prior decisions of this Court. See, e.g. *Holly v. Adams,* 544 S.W.2d 367 (1976).

ARGUMENT UNDER ASSIGNMENT III

The record in this action clearly establishes that Petitioner saw to it that her child was provided with all material things that were necessary for a physically and mentally healthy life. Additionally, it was not questioned

that Petitioner provided her daughter with her own love and affection. However, the propriety of her borrowing and receipt of assistance was questioned and apparently formed the basis of the lower court's termination on this issue. Thus, it becomes a pure question of law, as to whether this type of support, in lieu of the more traditional notions of what constitutes support, is sufficient to estop termination on this ground. This question is squarely raised by the facts of this case as they relate to this finding by the lower courts. Petitioner submits that this issue has previously been decided by this Court in *Heard v. Bauman,* 443 S.W.2d 715, 719 (1969). However, if it is this Court's view that its decision in *Heard* is no longer viable in light of the enactment of the Family Code, then Petitioner submits that it should be resolved in the instant case because of the increasing number of persons living in poverty who face or may face termination for nothing more than accomplishing survival for themselves and their family in a manner which is consistent with their skills as related to available jobs and family needs.

Additionally, the evidence showed that both Cynthia and her then husband, Kenneth, worked during the relevant time period and used this money, in part, to support the child. Of course, this bars termination on this ground, not only because of her own "working" but because the earnings of her husband which were used to support the child must, under the community property laws of this state, be deemed to be support by Cynthia. Failure to recognize this would threaten the family freedom to establish housekeeping in a manner which is consistent with their own religious, moral and personal views

about the individuals duty toward the family in fullfilling its needs. Such a position would not only be contrary to the broad prohibitions of the Fourteenth Amendment but would be opposed to the insular protections of the First Amendment to the Constitution of the United States.

Viewing the evidence from this perspective, Petitioner respectfully submits that to the extent that the lower courts based their decision to terminate her rights on this sub-section of § 15.02 of the Family Code, it was arbitrary and capricious and in violation of her rights to substantive due process. This Court should so hold.